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IN THE

Supreme Court of the United States

October Term 1968

No. [redacted] 165

CALVARY BIBLE PRESBYTERIAN CHURCH OF SEATTLE,
a non-profit corporation;
TACOMA BIBLE PRESBYTERIAN CHURCH,
a non-profit corporation;
REV. THOMAS W. MILLER and REV. HAROLD WEBB,
Petitioners,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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To the Supreme Court of the State of Washington

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, CALVARY BIBLE PRESBYTERIAN CHURCH OF SEATTLE, TACOMA BIBLE PRESBYTERIAN CHURCH, REV. THOMAS W. MILLER and REV. HAROLD WEBB, pray that a Writ of Certiorari issue to review the judgment of the Washington State Supreme Court in the above entitled case, the opinion of which was filed on the 28th day of December, 1967, and which became a final judgment on March 8, 1968, according to remittitur of the Washington State Supreme Court dated March 8, 1968.

REFERENCES TO THE RECORD

By stipulation of the parties and with the cooperation of the Washington State Supreme Court, arrangements have been made to forward a certified copy of the entire record to the Supreme Court.

References to the record are made herein as follows:

Portion of Record Cited	*Abbreviation Used*
Brief of Appellants	(R, BA, —)
Statement of Facts (verbatim record of the proceedings before the trial court)	(R, St. —)
Transcript (record of pleadings, motions, orders, etc., filed with the trial court)	(R, Tr. —)
Supplemental Transcript (record of argument of counsel and ruling of trial court on pretrial motions.	(R, Supp Tr. —)

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported in 72 W.D.2d 900, and printed in Appendix B hereto commencing at page A-7. The opinion of the Superior Court for King County is unreported and is printed in Appendix D, *infra*, pp. A-27 to A-33.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on December 28, 1967 (Appendix B, *infra*, pp. A-7 to A-24). Petition for Rehearing was denied and the judgment of the court below became final on March 8, 1968. The remittitur issued March 8, 1968, is printed in Appendix C hereto, *infra*, p. A-25. The jurisdiction of the court is invoked under 28 U.S.C. 1257(3). The question of jurisdiction was raised in the court of first instance

and in the appellate court as hereinafter set forth under the heading "Stages at Which Federal Questions Were Raised."

QUESTIONS PRESENTED

1. Does a Bible course at a state institution of higher learning which includes interpretation and study of the religious concepts and ideas contained in the Holy Bible, and which teaches one view of the origin, history and authorship of the Bible to the exclusion of other views, violate the Establishment Clause of the First Amendment as applied to the states by the Fourteenth Amendment to the U.S. Constitution?

2. Is the State of Washington in its educational institutions permitted to establish courses of study in the Bible which blend secular and sectarian instruction in such a manner as to demean the traditional concept of God and the Bible?

3. Do church organizations or their respective congregations have standing to raise the Federal Constitutional issue under the Establishment Clause?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The State statute authorizing the Board of Regents of the University of Washington to prescribe the courses of study at the University, Sec. 28.77.130, Revised Code of Washington, is printed in Appendix A, *infra*, p. A-1.

The constitutional provisions involved are as follows:

1. United States Constitution, First Amendment, set forth at Appendix A, *infra*, page A-3.

2. United States Constitution, Fourteenth Amendment, set forth in Appendix A, *infra*, page A-3.

3. Washington State Constitution, Article I, Section 11, set forth in Appendix A, *infra*, page A-5.

4. Washington State Constitution, Article IX, Section 4, set forth in Appendix A, *infra*, page A-6.

STATEMENT OF THE CASE

1. Pleadings and Prior Proceedings

This action was brought by the Calvary Bible Presbyterian Church of Seattle and the Tacoma Bible Presbyterian Church, and by their respective pastors individually and as representatives of their congregations to restrain the Board of Regents of the University of Washington from continuing a regular course of instruction in the Bible. The Superior Court for King County issued an order to show cause why the course should not be discontinued. Respondent moved to dismiss the complaint upon the ground that it did not state a cause of action and that the petitioners did not have standing to sue. The court ruled prior to trial that the individual plaintiffs had standing to maintain the action but that the churches did not have standing to sue. Following a six-day trial, the trial court found that the course as presented was not slanted in a religious direction, was not designed to induce particular religious beliefs nor to advance particular religious interests, and that the course did not amount to religious indoctrination by teaching from a fixed theological position to promote a particular theology. Based upon these findings the trial court concluded that the study of the Bible did not violate Article I, Section 11 or Article IX, Section 4 of the Washington State Constitution, nor did it violate the

Establishment Clause of the First and Fourteenth Amendments of the United States Constitution.

The majority opinion of the Supreme Court of the State of Washington affirmed the decision of the trial court, despite its prior holdings that the state constitution forbid the use of any public funds or public property for instruction in the Bible. The state supreme court also held that the individual petitioners had standing to maintain the action but that the church groups were not proper parties to raise the issues presented.

2. Stages at Which the Federal Questions Were Raised

The Federal Questions were raised in the original Complaint (R, Tr. 86), the Amended Complaint (R, Tr. 45), by pretrial motions (R, Supp. Tr. 2-10), by objections during the trial (R, St. 280), by post-trial argument and by Assignment of Error to the Supreme Court of the State of Washington (R, BA 8-15) including, among other assignments, the following:

> "8. The court erred in entering Conclusion of Law No. 2, as follows (Tr. 21):
>
> "'Neither the First Amendment of the Constitution of the United States nor those provisions of the Constitution of the State of Washington found in Article I, Section 11 (Amend. 34), and Article IX, Section 4, prohibit the defendant from offering, as a part of its curriculum, a course which studies the Bible for its literary and historic qualities when presented objectively as part of a secular program of education.
>
> "9. The court erred in entering Conclusion of Law No. 4, as follows (Tr. 23):
>
> "'The teaching of English 390 at the University

of Washington does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment of the Constitution of the United States as it applies to the states through the Fourteenth Amendment.'

"14. The trial court erred in dismissing the two church groups as plaintiffs and in refusing to admit evidence as to the complaints of said church groups (Tr. 56, St. 280).

"15. The trial court erred in ruling prior to trial that appellants had the burden to show that the course is "slanted in a religious direction, or designed to induce a particular religious belief, or to advance particular religious interests, or that the course amounts to religious indoctrination by teaching from a fixed theological position to promote a particular theology (Tr. 55)."

The questions were specifically considered and rejected by both the trial court and the Supreme Court.

3. Essential Facts

The facts established at the trial concerning the nature of the course are not in dispute. The course is regularly taught at the University of Washington, a public institution of higher learning operated by the State of Washington and supported by public funds. The course is taught by regularly appointed members of the faculty of the University, the prescribed text being the Revised Standard Version of the Holy Bible (R, Tr. 50; R, St. 568), although on occasion the King James Version of the Bible is selected as a text (R, Tr. 17; R, St. 562).

That the Bible is a uniquely religious book concerned almost entirely with the relationship of God and man was admitted by all of the prominent theologians and church leaders who testified on behalf of both petitioners

and respondents, including the teachers of the course.[1]

The professors who taught the course admitted that inquiry as to the religious content and meaning of the Bible constituted the main purpose in teaching the course (R, St. 27, 52-55, 598; R, St. 565-566), it being agreed that the students had a strong desire to examine and consider the basic religious beliefs contained in the Bible (R, St. 571-578).

The evidence was uncontradicted that the course as presently taught includes consideration of the authorship of the various books of the Bible and interpretation of the origin, development and significance of the Bible as a religious book (R, Tr. 13, 21). The testimony of the various Bible scholars, church leaders and theologians who testified established conclusively that within Christendom today there are two opposing views regarding the nature and origin of the Bible, and that these views are a matter of religious belief and controversy. The traditional view is that the Bible is the Revealed Word of God; the contrary modernist view presented in the course challenges the genuineness and divine authority of the Bible (R, St. 118-157, 378-380).

It was uncontradicted that the creeds of many churches designate the Bible both as the Word of God and the sole authority in matters pertaining to religion. It was further admitted that the split within Christendom brought about by the two opposing religious views regarding the nature and authority of the Bible was the cause of the formation of two sets of national and international religious organizations, the traditional view be-

1. Dr. MacRae, President of the Faith Theological Seminary; Dr. Wright, Prof. of Old Testament at Harvard Divinity School; Dr. McIntire, President of International Council of Christian Churches; Dr. Michaelsen, University of California; Prof. Fowler and Prof. Irmscher, University of Washington (R, AB 4).

ing represented by the American Council of Christian Churches and the International Council of Christian Churches, and the liberal view taught at the University being represented by the National Council of Churches and the World Council of Churches (R, St. 264-272, 287-290, 320-323, 645-654).

The witnesses had no difficulty identifying the particular view taught at the University, and the dissent in the state supreme court opinion was compelled to conclude that the course constituted a direct attack upon the religious belief of those who profess that the Bible is the Revealed Word of God (App. B, A-19). Bible scholars of both Old and New Testament testified that the course was obviously slanted toward the so-called liberal or modernist view (R, St. 129-134, 157, 232-238). The primary witness for respondent also admitted that much of the factual material presented in the study outline for the course was representative of the particular view of the Bible held by the instructor and himself (R, St. 382, 384-385, 407, 410-415, 418, 433), and Professor Fowler, the instructor, himself an elder of the United Presbyterian Church (R, St. 18), admitted his own inclination toward the modernist view (R, St. 54, 61-62, 90-91), and admitted that he taught the course in his own Sunday School in the same manner as was presented in the course (R, St. 20-21, 64, 111-112).

The outline written by the most frequent teacher of the course as a study guide for the course likewise presents the modernist view, setting forth asserted facts incompatible with Moses being the author of The Pentateuch (R, St. 124-127, 166-170, 201, 339, 640); Isaiah

as author of the Book of Isaiah (R, St. 138, 162-164); Daniel as author of The Book of Daniel (R, St. 237, 639); Paul, the Apostle, as author of the Pastoral Epistles (R, St. 232-233); Peter as author of First Peter and Second Peter (R, St. 234-235); and David as author of the Psalms (R, St. 237-238).

That these controversial religious matters caused concern among the students was clear from the testimony of one of the students, a portion of which is set forth in the dissenting opinion (App. B, p. A-20). The instructors also admitted conflict with students over interpretation of traditional passages in the Bible (R, St. 85, 88-90), and at least one of the instructors admitted that he instructed the students that the story of Adam and Eve in the Bible is a myth (R, St. 558-560).

Despite these facts, the trial court and the majority of the court below found that the course was taught in an "objective manner as part of a secular program of education," and that it does not promote a particular theology for purposes of religious indoctrination, and is not slanted in a religious direction or designed to induce any particular beliefs or to advance any particular religious interests or theology (A-16; A-29).

REASONS FOR GRANTING THIS WRIT

1. The decision of the Washington State Supreme Court permits the establishment of religion contrary to all of the previous decisions of this court, including: *School District of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (1963); *Engel v. Vitale*, 370 U.S. 421, 82A S.Ct. 1261 (1962); *McCollum v. Board of Education*, 333 U.S. 203,

68 S.Ct. 461 (1948); and *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504 (1947).

The decision is particularly startling in view of the previous decisions by the Washington court in *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 174 Pac. 435 (1918), and *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 1000 (1930), which held that course instruction in the Bible is constitutionally prohibited, regardless of the stated secular purpose of the course and regardless of the non-denominational presentation of the course.

However, in the face of its previous decisions and all case decisions on the doctrine of separation of church and state, the majority of the court concluded that since the course was presented "objectively as part of a secular program of education," it did not violate the constitutional provisions (App. B, A-16, *et seq.*)

The interpretation placed upon *School District of Abington v. Schempp, supra*, is that teaching of the Bible and religious instruction is permissible if it is not slanted toward any particular theological or religious point of view or does not in fact indoctrinate anyone in a particular faith or belief. The interpretation of *Schempp* by the trial court was even more permissive, since it found merely that the course does not promote a particular theology for *purposes of* religious indoctrination (App. D, A-32).

Thus the dicta in the *Schempp* case referring to "study of the Bible or of religion, when presented objectively as part of a secular program of education" has been so interpreted as to reverse the spirit and letter of all previous decisions on the separation of church and state by this

court, as well as the specific holding of the *Schempp* case itself.

2. The case is one of first impression, both as to the teaching of the Bible in a public institution of higher learning, and as to the teaching of a course devoted exclusively to the Bible. No cases were cited by the regents in any of the various arguments below which supported the opinion of the trial court or the Washington State Supreme Court. This novel rule, established without case precedent, therefore sets the guidelines for Bible courses and courses on religion in all public educational institutions in the State of Washington; and the opinion undoubtedly will serve as a model for Bible courses at state institutions of higher learning in all of the states.

3. The decision of the court below authorizes the teaching of secular religion in the public schools. The testimony was uncontroverted that the manner in which the course was taught was in accordance with doctrines promulgated by various churches affiliated with the National Council of Churches.

The dissent in the opinion below had no difficulty concluding that the course involved religious instruction and constituted a direct attack upon the religious beliefs of those who considered the Bible as the Revealed Word of God (App. B, A-19). However, the majority opinion, while admitting that there was conflicting testimony, concluded that since the primary purpose of the course was not indoctrination of religious beliefs, the presentation of a particular religious view did not violate the constitutional prohibitions.

Under the decision of the court below there would presumably be no restriction against specific courses in the Bible presenting solely the views of a particular religion, so long as the courses were authorized by the public institution, presented by members of the faculty, and capable of being considered educational rather than devotional in nature (i.e., so long as the course was not *designed* to indoctrinate students to a particular faith). It is submitted that this interpretation of the Establishment Clause of the First and Fourteenth Amendments is so directly contrary to the holdings of all the previous decisions of this court that the rule set down should be reviewed.

4. The interpretation of the constitutional prohibitions against the establishment of religion by the court below would aid the establishment of *some* religions since it approves the particular religious view being promulgated at the University of Washington. The strict neutrality rule set down in *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504 (1947), and approved in *School District of Abington v. Schempp,* is thus vitiated since the state government with approval of the court has preferred the modernist Protestant Christian interpretation of the Bible and has disparaged the traditional interpretation of the Holy Scriptures.

In the future applications of the rule, some religious groups would necessarily be aided by permission to teach their doctrine. Since the Board of Regents has the legal authority to hire teachers and prescribe courses of study, the state would have the power to determine what particular religion could or should be taught. The only re-

striction placed upon the manner of teaching religion and the Bible is that it be taught as a regular part of the curriculum and be presented in an objective manner. What would constitute "objective religion" has never been considered by this court, and in view of the dicta in the *Schempp* case referring to the "possible study of the Bible in a secular course of education," this case requires review of the new rule evolved by the Washington State Supreme Court.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX A

Revised Code of Washington

28.77.130 Powers and duties of regents. The board of regents may adopt bylaws or rules and regulations for its own government. The powers and duties of the board of regents are as follows:

First. The said board shall have full control of the university and its property of various kinds, and shall employ the president, members of the faculty, assistants and employees of the institution, who shall hold their positions during the pleasure of said board of regents.

Second. It shall be the duty of the board of regents, with the assistance of the faculty of the university, to prescribe the course of study in the various departments of the institution and to publish the annual catalogue.

Third. The said board shall grant to every student, upon graduation, a suitable diploma or degree, such student having been recommended for such honor by the faculty. The board shall also have power, upon recommendation of the faculty, to confer the usual honorary degrees upon other persons than graduates of this university in recognition of their learning or devotion to literature, art or science; but no degree shall ever be conferred in consideration of the payment of money or other valuable thing. The said board is also empowered, upon recommendation of the faculty, to grant normal diplomas which shall entitle the holder to teach in any public school in the state for a period of five years; and to grant university life diplomas to candidates who shall give satisfactory evidence of having taught successfully for twenty-four months: *Provided*, That all candidates for

the normal diploma and life diploma shall have satisfactorily completed not less than twelve semester hours in the department of education.

Fourth. The board of regents is authorized to receive such gifts, grants and conveyances from private sources, and bequests and devises, of real and personal property, as may be made from time to time, in trust or otherwise, for the use and benefit of said university or any of its departments; and to sell, lease or exchange, invest or expend the same or the proceeds, rents, profits and income thereof according to the terms of said gifts, grants, conveyances, bequests and devises. The said board shall adopt proper rules to govern and protect the receipt and expenditure of the proceeds of all fees, and the proceeds, rents, profits and income of all gifts, grants, conveyances, bequests and devises above mentioned, and shall make full report of the same in the customary biennial report to the governor, or more frequently if required by law: *Provided, however,* That nothing herein contained shall be construed to repeal, amend or in any way modify any of the provisions of R.C.W. 28.77.340.

Fifth. The board of regents is authorized and empowered to give and execute, on behalf of the state of Washington, the bonds and other papers required by the war department and/or navy department for the safekeeping of the arms and equipment loaned by the United States to the University of Washington.

Sixth. The board of regents shall transmit, on the first day of January preceding each regular session of the legislature, to the governor a printed report of all the doings since their last report, not exceeding three hundred in

number, giving full information of the receipt and expenditure of money, furnish an estimate of the needs of the institution, and give such information as will be helpful to the state authorities in providing for the said institution.

Seventh. The members of said board of regents shall serve without compensation. Each regent, however, shall be paid his actual traveling expenses in going to and coming from any meeting of said board, and such claims for expenses shall be audited on vouchers issued by the president and secretary of said board the same as any other claims are audited.

UNITED STATES CONSTITUTION

AMENDMENT I

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of Representatives in Congress

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. Persons disqualified from holding office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. What public debts are void

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Power to enforce article

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WASHINGTON STATE CONSTITUTION

ARTICLE I, SECTION 11

§ 11. Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion, but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor

be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

ARTICLE IX, SECTION 4

§ 4. Sectarian Control or Influence Prohibited. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

APPENDIX B

WEAVER, J.—Since 1919, the Department of English of the University of Washington, a state tax-supported university, has offered an elective course of study presently designated "English 390: The Bible as Literature."

Two churches, incorporated organizations, and their respective ministers commenced this action against the Board of Regents of the University of Washington praying (1) for an injunction pendente lite directing the defendants to discontinue "the prescribed course[1] until such time as the matter may be fully considered by the court;" and (2) for a "permanent injunction . . . restraining the Board of Regents from authorizing any course of instruction dealing with the historical, biographical, narrative or literary features of the Bible."

Plaintiffs contend that the teaching of English 390 is violative of Art. 1, §11 and Art. 9 §4 of the Washington State Constitution, which provide:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction . . . [Art. 1, §11].
>
> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence" [Art. 9, §4].

Plaintiffs also contend that the teaching of English 390 violates the First Amendment of the United States Constitution ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .") as applied to the states through the Fourteenth Amendment.

Although the constitutional violations are urged, the

1. The course is not prescribed; it is an elective.

major premise of plaintiffs' argument, as alleged in their amended complaint, is:

> "That the manner in which said presentation is made [of English 390] is contrary to the religious beliefs of plaintiffs, both individually and as church organizations and congregations. That said manner of presentation is in itself the presentation of a religious point of view, being one of several theological positions within the Protestant faith.

After hearing upon plantiffs' motion for a temporary injunction and defendant's motion to dismiss the complaint, the trial court:

1. Denied plaintiffs' motion for a temporary injunction and authorized defendant "to grant such credits as are ordinarily granted to those students in said course who successfully complete it . . ." pending final decision:

2. Dismissed the two churches as parties plaintiff "on the ground that said plaintiffs have no standing to sue as taxpayers;"

3. Refused to dismiss the two ministers as parties plaintiff for they "have standing to sue as taxpayers without further showing of interest;"

4. Determined the guidelines for the trial of the issues by ordering:

> "that the issues of fact upon which the plaintiffs have the burden of proof is whether English 390 as taught at the University of Washington by Professor Fowler, or any other instructor at the University, is slanted in a religious direction, or designed to induce a particular religious belief, or to advance particular religious interests, or whether the course amounts to religious indoctrination by teaching from a fixed theological position to promote a particular theology; . . ."

It is apparent at once that plaintiffs' major premise does not meet directly the guidelines laid down by the trial court. Basically, the question before the trial court was factual. The problem is one of the purpose and character of the teaching.

The trial court found: that English 390 concerns itself with the literary features of the Bible and, as a necessary part thereof, the history of ancient Israel; the authorship and treatment of the various books of the Bible, and their interpretation from a literary and an historical point of view, employing the same techniques of scholarship used in the study of any other literary or historical text; that the course is offered as part of a secular program of education to advance the knowledge of students and the learning of mankind; that it is taught by members of the English department who are competent literary scholars, qualified to teach in their respective fields of specialization. The course is not taught by theologians. One professor uses the Revised Standard Version of the Bible; another the Oxford Annotated Edition of the Revised Standard Version; a third, the King James version. Each makes his choice of the English translation for his own professional reasons.

Further, the court found that English 390 is taught as a study of the Bible for its literary and historic qualities and is presented objectively as a part of a secular program of education.

Finally, the court found that the course:

> "does not promote a particular theology for purposes of religious indoctrination, nor is it slanted in a religious direction, nor does it induce any particular religious belief, nor does it advance any particu-

lar religious interests or theology.

"There is no evidence that English 390, as taught at the University of Washington, is intended to affect the religious beliefs of students taking the course or indoctrinate them in any particular religious belief, or that it has had that effect."

The trial court dismissed plaintiffs' complaint with prejudice.

Plaintiffs' 15 assignments of error may be grouped into three categories. The *first* contains assignments of a technical nature usually made to insure that everything is before the appellate court. The assignments of error in the *second* category are directed to the trial court's dismissal of the two churches as parties plaintiff. The *third* group of assignments involves the trial court's refusal to adopt plaintiffs' proposed findings of fact and conclusions of law and its adoption of those proposed by the defendants.

The first category of plaintiffs' assignments of error need not be discussed.

The second—the dismissal of the two churches as parties plaintiff because they are not taxpayers and have no "standing" to raise the questions involved—presents a problem that is as much a question of political science as it is of law.

The traditional approach is that a taxpayer must show that he has a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers, before he may maintain an action against the state or one of its agencies, to test the constitutionality of a statute or an administrative policy. It

is not the province of the court to delve into the policy judgments of other branches of government. On the other hand, the court does have a responsibility to protect the legislative and executive branches of government from legal actions of harassment by those who do not have rights affected; and to protect the public from the possibility that judicially-developed law may become the product of friendly suits in which both parties seek to establish the same principle, to the detriment of others whose rights will be controlled by the precedent established.

It would be unrealistic to say that this court has always been consistent in its determination of those who had "standing" to maintain an action to test the constitutionality of a statute or of an administrative ruling or practice.[2] In a plethora of decisions between *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067 (1891); and *Fransen v. Bd. of Nat. Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965), a variety of conclusions have been reached. Some of the distinctions the court has drawn are shadowy and inconclusive.

In one field, however, it is rather certain that the plaintiff must at least be a taxpayer. Plaintiff churches cite only one case in support of their contention that they should not have been dismissed from the case—*Perry v. School Dist. No. 81*, 54 Wn.2d 886, 344 P.2d 1036 (1959), (released-time from school for religious instruction).

2. See Peck: Standing Requirements for Obtaining Review of Governmental Action in Washington, 35 Wash. L. Rev. 362 (1960).

Factually, it appears that several religious organizations were granted permission to file complaints in intervention in the *Perry* case. The decision, however, does not discuss the "standing" of the plaintiffs in intervention, and we do not consider the case authority for the position of the plaintiffs in this case.

Since the trial court found that appellant churches were not taxpayers, it was not error to dismiss them from this case.

Defendant-respondent makes a passing reference to the alleged error of the trial court when it permitted the two tax-paying ministers to remain as parties plaintiff.

In *Fransen, supra,* this court cited *Reiter v. Wallgren,* 28 Wn.2d 872, 184 P.2d 571 (1947); *State ex rel. Lemon v. Langlie,* 45 Wn.2d 82, 273 P.2d 464 (1954); and *State ex rel. Tattersall v. Yelle,* 52 Wn.2d 856, 329 P.2d 841 (1958). The court therein permitted a taxpayer to maintain an action, saying:

> "The defendants maintain that, if taxpayers are allowed to bring injunction actions against public officers, the administration of public affairs will be unduly hampered. They have not brought to our attention a case illustrative of this evil, and certainly the instant action is not an example of unwarranted harassment.
>
> "Inasmuch as it has not been demonstrated to the court that such taxpayers' suits result in more harm than good, we will not, on this occasion, overturn the rule allowing them" (66 Wn.2d at 677).

We believe *Fransen, supra,* despositive of the instant problem.[3]

Finally, we come to the third category of plaintiffs' assignments of error—the failure of the trial court to adopt their proposed findings of fact and conclusions of law and the entry of those based upon defendant's position.

On many occasions, this court has considered such assignments of error simply as an invitation for us to retry the case upon the written record and second-guess the trial court. This we have refused to do. Although admittedly based upon conflicting testimony, we find that there is substantial evidene to support the findings of fact entered by the trial court. We accept them as verities.

The sole question remaining is whether the conclusions of law, based upon the findings, are violative of the constitutional provisions quoted *supra.*

The touchstone of the problem is the meaning attributed to "religious . . . instruction," as used in Art. 1, §11 of our constitution. It must be kept in mind that the words appear after two more specific terms: "worship" and "exercise." This, we believe, is an indication that the framers of our constitution did not intend the word

3. Under the present status of our decisional law, it is the *personal* opinion of the author of this decision that what is permissible or proper involves some policy judgment on the part of the court. If the action does not hamper the operation of government pendente lite, or *harass the state* or an agency thereof, and does involve a question of grave public importance, it should be considered by the court. This conclusion is somewhat shaken by an article entitled, "Ministers Seek to Oust U.W. Prof.," appearing on page 69 of the November 9, 1967, Seattle Times. One of the ministers named is a plaintiff in the present action. The article reports that he seeks the ouster of an assistant professor of anthropology.

"instruction" to be construed without limit, but that the proscribed field be confined to that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct, i.e., instruction that is devotional in nature and designed to induce faith and belief in the student.

There can be no doubt that our constitutional bars are absolute against *religious* instruction and indoctrination in specific religious beliefs or dogma; but they do not proscribe open, free, critical, and scholarly examination of the literature, experiences, and knowledge of mankind. If they did, many fields of scholarship—anthropology, zoology, the theory of evolution, astronomy, the germ theory of disease and medical cure, to mention only a few—would have to be removed from our university. It might be said that the objective examination of these theories conflicts with the religious beliefs of certain persons entertaining contrary beliefs based upon their religious convictions. This would, indeed, be true "sectarian control or influence," which is prohibited by Art. 9, §4 of our constitution. It would, as Mr. Justice Brennan said so recently,

> "cast a pall of orthodoxy over the classroom. *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 Sup. Ct. 675 (1967).

The result advocated by plaintiffs would be catastrophic in the field of higher education. Would plaintiffs have us strike the works of Milton, Dante, and other ancient authors whose writings have survived the ages, because they wrote of religious theories with which plain-

tiffs quarrel? Our constitution does not guarantee sectarian control of our educational system.

In *McCollum v. Board of Education*, 333 U.S. 203, 92 L.Ed. 649, 68 Sup. Ct. 461 (1948), Mr. Justice Jackson, in a concurring opinion, pointed out that:

> "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren."

In the final analysis, plaintiffs contend: (1) That the Bible *cannot* be taught objectively as a course in literature, for the attempt to do so violates their personal beliefs (sectarian); hence, the teaching is unconstitutional; (2) That the course *is not* taught objectively, but is slanted against plaintiffs' beliefs.

It is apparent that the two contentions overlap factually. The case was well presented to the court, although the evidence of the parties splashes over the guidelines set by the trial court, established both by pretrial order and at the commencement of the trial.

The testimony is fascinating reading for one interested in the subject. Competent scholars, educators, professors, ministers, theologians, and students who had taken the course testified. It would unduly extend this opinion to analyze the testimony of any group of witnesses, except, perhaps, to mention the testimony of the students.

There is competent testimony to support the trial court's conclusion that "English 390—The Bible as Lit-

erature" *can* be taught objectively in a course in literature, without religious implications, for the court found that the course does not promote a particular theology for purposes of religious indoctrination; that it is not slanted in a religious direction; that it does not induce any particular religious belief; and that it does not advance any particular religious interest or theology.

Not only is this conclusion justified by the oral testimony of experts, but it is supported by authorities upon the subject. They are set forth in the margin.[4]

Experts may talk in the abstract, but the "proof of the pudding is in the eating." Besides the experts, the following students who had taken English 390 testified: one who had no personal religious beliefs; a Catholic with a parochial school education; one who described herself as "a rather devout Methodist"; one a Christian Scientist; one a member of a Jewish synagogue (an outstanding student and the University's nominee as a Rhodes scholar).

Telescoping their testimony, we find that English 390 was taught in a completely objective manner; had no effect on religious beliefs; was not slanted toward any particular theological or religious point of view; did not indoctrinate anyone; did not enter into the realm of belief

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4. Katz, Religion and American Constitutions, 52, 53 (1963); Kauper, Religion and the Constitution, 98, 99 (1964); Pfeffer, Church, State, and Freedom 309 (1953); Black, Religion, "Standing," and the Supreme Court's Role, 13 J. Pub. Law 459, 466 (1964); Casad, On Teaching Religion at the State University, 12 Kans. L. Rev. 405, 411, 412 (1964); Katz, Freedom of Religion and State Neutrality, 20 U. Chi. L. Rev. 426, 431 (1953); Kauper, Church and State; Cooperative Separatism, 60 Mich. L. Rev. 1, 31 (1961); Michaelsen, The Supreme Court and Religion in Public Higher Education, 13 J. Pub. Law 342, 346 (1964).

or faith; and was not taught from a religious point of view.

This, we believe, is sufficient to support the trial court's findings and to justify its conclusion that "English 390 —The Bible as Literature," as taught at the University of Washington, is not violative of the constitutional provisions we have identified.

Plaintiffs place great reliance upon *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 Pac. 35, L.R.A. 1918 F. 1056 (1918), (a departmental opinion). The case is not opposite for two reasons: first, the facts are entirely different; and second, a judge concurring in the result pointed out that he saw "no need of many of the observations and much of the controversial discussion" contained in the opinion. (It is not often the court points out its own dictum.)

Dearle was an action of mandamus to force the school board to give the petitioner an examination in the course of Bible study and to give high school credits for graduation therefor. Clearly, the program set up by the state board of education and the local school board violated our constitutional prohibitions.

Recently, the Supreme Court in *Whitehill v. Elkins*, ... U.S. ....., ... L.Ed.2d ...., 88 Sup. Ct. 184, slip opinion, November 6, 1967 (1967), quoted with approval from *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L.Ed.2d 1311, 77 Sup. Ct. 1203, (1957). Although the facts are different, the language has a bearing upon the problem before us. The court said:

> "The essentiality of freedom in the comminity of American universities is almost self-evident. No one

should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. *Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes.* Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (Italics ours).

The judgment is affirmed.

WEAVER, J.

We concur:

FINELY, C. J.
HILL, J.
DONWORTH, J.
HAMILTON, J.
HALE, J.
DENNEY, J. Pro Tem.
JAMES, J. Pro Tem.

Rosellini and Neill, JJ., disqualified themselves from participating in the hearing and disposition of this appeal.

No. 39226

HUNTER, J. (Dissenting)—I dissent. The main thrust of the majority opinion is that English 390 as taught at the University of Washington does not contravene our state constitutional prohibition against religious instruction in public schools, Art. 1, §11 and Art. 9, §4; because it is a purely objective historical and literary study of the Bible, and is not motivated by the purpose of religious indoctrination or inducement of any religious belief. Regardless of

how well intended the course may be, the record compels me to conclude that it is religious instruction and constitutes a direct attack upon the religious belief of many taxpayers of this state, who profess that the Bible is the "Revealed Word of God." This religious instruction and religious controversy in public schools in interdicted by our state constitution, *supra*.

The witnesses for both the appellants and respondents testified that within Christendom today there are two opposing religious views: (1) the traditional view that the Bible is the "Revealed Word of God," and (2) the liberal view that man is free to judge the genuineness and authority of the Bible. There can be no question from this record that the more liberal view is a part of the study for this course.

The outline written by Professor Fowler, as a study guide for the course, sets forth asserted facts inconsistent with Moses being the author of The Pentateuch; Isaiah as author of the Book of Isaiah; Daniel as author of The Book of Daniel; Paul, the Apostle, as author of The Pastoral Epistles; Peter as author of First Peter and Second Peter; and David as author of Psalms. It is conceded that the authorship of these books of the Bible is a matter of religious controversy.

The record, however, goes further. Dr. Wright, one of the instructors in the course, admitted that much of the factual material presented in the study outline was representative of the particular view of the Bible, held by Professor Fowler and himself, and also referred to as the Graf-Wellhausen hypothesis, the documentary hypothesis view, and the modernist view. Professor Fowler admitted

his ideology was of the liberal view. Professor Irmscher, one of the instructors in English 390, admitted he instructed the students that the story of Adam and Eve in the Bible is a myth.

The following testimony of a student in the course further demonstrates the liberal point of view of the instructors:

"Q. (by Mr. Smith) Did you have the impression that the course was slanted in a religious way?

"A. Yes, I did.

"Q. Could you state in what way?

"A. It was slanted toward the liberal views of theology, specifically higher criticism, variously known, I believe, as documentary hypothesis. Also there was a certain amount *of making characters in the early parts of Genesis as myths, which would be the mythologizing of the scriptures. And he also felt that Paul in the New Testament was the one that emphasized and pushed the New Testament church; rather than using the teachings of Jesus, that Paul himself was the one that was the genius of the New Testament Church* (Italics mine).

This direct attack on the integrity of the Bible unquestionably arouses deep resentment among those who adhere to the traditional view, and who are denied in this instance the assurance under our state constitution, Art. 1, §11 and Art. 9, §4, that their tax monies will never be used to support religious instruction.

The majority's holding that historical and literary study of the Bible, without the purpose of indoctrination in a specific religious belief, dogma, or creed, does not constitute religious instruction under our constitution, Art. 1, §11, is not supported by authority in this state. To the contrary, in *State ex rel. Dearle v. Frazier*, 102 Wash.

369, 173 Pac. 35 (1918), we specifically held that any religious instruction is objectionable under our state constitution, even though it be neither sectarian, doctrinal, or denominational. We held there, that limited religious instruction, which involved state support only to the extent of furnishing an outline of study, conducting examinations and the grading of papers covering only the *historical, biographical, narrative and literary features of the Bible*, violates Art. 1, §11 of our State Constitution, as amounting to the application of public funds to religious instruction. This limited purpose "instruction" was found unconstitutional even though actual "instruction" did not occur in the public schools, but was designed to be pursued at home or under the guidance of any church organization of the student's choice.

In this landmark case, speaking through Mr. Justice Chadwick, we stated:

> "In the light of other constitutions, the abuses in other states, and the evident purpose of the framers of the Constitution to save some of the questions which had there arisen, *there can be no doubt that more was intended than a simple declaration that our schools should be kept free of sectarian influences.* Art. 1, §11, is all significant. The words 'No public money shall be appropriated for or applied to any *religious* worship, exercise, or *instruction are sweeping and comprehensive.*
>
> "Our inquiry may be limited, then, to the one question, whether an examination of pupils upon *'the historical, biographical, narrative, and literary features'* of the Bible is religious instruction within the meaning of the Constitution. To meet the premise of counsel for respondent, we would have to read the prohibition as if it were 'No public money shall be applied to any *denominational or sectarian* worship, exercise, or instruction,' and reject the broader

term "religious;' *for his argument proceeds as if the sole object of the constitution was to keep the schools free of sectarian influences at* 375 (Italics mine).

We further stated:

"*But it is said that the teaching is to be upon the historical, biographical, narrative, and literary features of the Bible only, and in this the instruction will be neither sectarian, doctrinal, denominational nor religious.* This might be true if all citizens were agreed that the King James' translation of the Bible is a true version of the scriptures, and then only if the teaching were under the control of those who are selected through the means and methods provided by law. But the vice of the present plan is that school credit it to be given for instruction at the hands of sectarian agents. *Then, too, all citizens are not agreed as to the narrative and historical worth of the Bible.* It is true that some of the events there recorded have shaped the destinies of millions of people, yet they are not mentioned in profane co-temporaneous history. Some are not agreed whether many of the events there narrated are historical or allegorical; whether the earth was created in six days; where Cain obtained his wife; whether the whole earth was covered with a flood of waters; whether Jonah was swallowed by a whale; whether Elijah was translated by a whirlwind into heaven; whether Lot's wife was turned into a pillar of salt; whether our God stopped the sun it its course that Joshua might overcome his enemies; whether he made the waters of the sea to recede that his chosen people might pass to the promised land; whether God spake with the prophets, or ordered the lives of such great rulers as David and Solomon; *are questions all sounding in narrative and history that have excited differences and controversies that are never settled.*

"*That Bible history, narrative, and biography can not be taught without leading to opinion, and oft-times partisan opinion,* is understood and anticipated by the school board. They admit, as plainly as language can admit, that Bible teaching does lead to

sectarian opinion and differences of opinion upon religious questions. They employ the word 'religious' in a narrow and sectarian sense. They speak of 'Religious organizations' and provide that 'interpretation' shall be given in the home, or by some religious organization.'

"Now we had thought that 'history, biography and biblical narrative' would require no interpretation—certainly no interpretation calling for the doctrinal opinion of a religious organization. And who of authority in our schools is to say that a pupil shall, or shall not, have credit if he answers questions in a way that is different from the way intended by those who prepared the course of instruction. It may be said that the pupil is entitled to credit if he answers in a way that is consistent with the faith of his instructor. But there are two objections to this. The one is that the examiner may not know the faith and teachings of those of a different faith; the other and more conclusive objection is that, to give credit in the public school for such instruction, is to give a credit for sectarian teaching and influence, which is the very thing outlawed by the constitution." at 377, 78, 79. (Italics mine.)

I cannot agree with the majority that the views expressed in the *Dearle* case are dicta. The *Dearle* case is the law of this state to which I would adhere.

The majority further states that if this court holds that English 390 is constitutionally prohibited, such holding would result in the elimination of courses in many other fields of instruction, such as zoology, anthropology, theory of evolution, and astonomy, that may be inconsistent with the fundamentalist interpretation of the Bible. I can see no reason to raise this specter. Courses of this nature are not affected by the constitutional prohibitions in Art. 1, §11 or Art. 9, §4. These courses have no resemblance to religious instruction and in no manner come under the ambit of our constitutional prohibitions, *supra*.

In my judgment the majority has disregarded the basic purpose of the framers of our constitution in adopting Art. 1, §11 and Art. 9, §4 of our state constitution, which purpose we stated in *Dearle, supra,* at 381:

> "We shall not go far afield when we suggest that it is a matter within the common knowledge of those who followed the discussion attending the framing of our constitution *that it was the purpose of the men of that time to avoid all of the evils of religious controversies,* the diversion of school funds to denominational schools and institutions, and the litigation that had occurred in other states. *For it was known that religious opinion is a thing that men will fight for, and sometimes in most insidious ways.* The question then was—and the people who adopted the constitution were so advised—whether we should adopt a constitution which provided *in terms that no religious instruction should ever be a part, directly or indirectly, of the curriculum of our schools.* (Italics mine.)

What has happened in the present case is the very thing that the framers of our constitution sought to avoid: the unquestionable resentment of many of our citizens in knowing their tax dollars support a state university that tolerates religious instruction in a course that discredits the genuineness of a book *sacred* and *holy* to them.

I would reverse the trial court and grant the injunction prayed for.

Hunter, J.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CALVARY BIBLE PRESBYTERIAN CHURCH OF SEATTLE, a nonprofit corporation; TACOMA BIBLE PRESBYTERIAN CHURCH, a nonprofit corporation; REVEREND THOMAS W. MILLER; and REVEREND HAROLD WEBB, *Appellants,* v. BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON, *Respondent.*	Remittitur No. 39226 King County No. 657, 671

The State of Washington to: The Superior Court of the State of Washington in and for King County,

This is to certify that the opinion of the Supreme Court of the State of Washington filed on December 28, 1967, became the final judgment of this court in the above entitled case on March 8, 1968. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

> " Five hundred forty eight and 62/100 dollars ($548.62) in favor of respondent and against appellants and against appellants' surety, Western Surety Company, to the limit of the surety's bond.

IN TESTIMONY WHEREOF, I have hereunto set my

hand and affixed the seal of said court at Olympia, this 8th day of March, A. D. 1968.

William M. Lowry
Clerk of the Supreme Court,
State of Washington.

cc: Court Reporter
Cartano, Botzer & Chapman,
Mr. Douglas J. Smith
Honorable John J. O'Connell, Atty. Gen.
Mr. James B. Wilson, Assistant
Mr. Arval A. Morris
Lenihan & Ivers
Mr. Henry T. Ivers
Mr. Carl P. Jenson

APPENDIX D

Oral Opinion of the Superior Court for King County

THE COURT: First of all, I want to compliment the attorneys on the briefs that have been submitted. You have spent a great deal of time, and have all done a real, commendable job as professional men in giving me every possible facet of the issue and of the problems presented. The caliber of the witnesses and the earnestness with which everyone participated in this case have been very impressive to me, and I appreciate the courtesies extended by all attorneys to me.

Now we get right down basically to the question of fact, which is this: Is the teaching of English 390 as taught by the University of Washington prohibited by the United States or the Washington State Constitution. I have to answer this, "No, it is not."

First of all, I distinguish Dearle, a Washington case principally on two bases:

(1) This course, English 390, is an elective course. It is not required.

(2) The University of Washington, or any institution, is an institution of higher learning; and no one has to attend. It is a privilege to attend. It isn't necessary that people attend; and the students in an institution of higher learning, certainly as far as their minds are concerned, are developed. They are as adult as they can be, I think. Their minds are capable of retaining or learning as much as at any period of their lifetime.

I distinguish Schempp and the statement by Justice Clark in the Schemp ruling to this effect—and I quote:

"Nothing we have said here indicates that such

> study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

In other words, with the Constitution. Certainly I am impressed with the objective treatment of English 390; and I think that I have also to find that the Bible as Literature is a proper subject of the humanistic field.

I will accept the findings as proposed by Mr. Wilson, with one or two changes. On proposed number six, I will change the word, "of," in the second line to "about." And I am initialing the margin.

It is a matter of semantics, but I think that perhaps "a knowledge" of the Bible instead of "an understanding" would be better on line number three, as suggested by Mr. Smith. I am changing that, and initialing on the margin.

On proposed finding number eight, on the fourth line after the fourth word, "has," I have interlineated "had." So it reads, in other words, "has had that effect." I am initialing in the margin.

I am accepting the conclusions as submitted, and the judgment, and am as of this 14th day of June executing the same.

Court is adjourned.

(Conclusion)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

THOMAS W. MILLER; and HAROLD WEBB, v. BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,	*Plaintiffs,* *Defendant.*	No. 657671

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Presented by:
JOHN J. O'CONNELL
Attorney General

By.....
JAMES B. WILSON,
Assistant Atorney General
Attorney for Defendant

FINDING OF FACT NO. 1

Plaintiffs, Harold Webb and Thomas W. Miller, are taxpayers of the state of Washington.

Defendant, Board of Regents of the University of Washington, is the duly authorized and designated party vested with the duty of governing the University of Washington and, with the assistance of the faculty, prescribing the course of study of the various departments therein and appointing the faculty of the University. The University of Washington is a public institution of higher learning operated by the State of Washington and supported by public funds.

FINDING OF FACT NO. 2

One of the courses regularly offered by the defendant since 1919 through the Department of English of the University of Washington, is English 390: *The Bible as Literature,* which was most recently offered during the Spring 1966 Academic Quarter which commenced on March 28, 1966. The defendant proposes to offer said course during the Summer Quarter, 1966, and the Autumn Quarter, 1966.

English 390 concerns itself with the literary features of the Bible and as a necessary part thereof the history of ancient Israel, the authorship and treatment of the various books of the Bible and the interpretation of the Bible from a literary and an historical point of view, employing the same techniques of scholarship used in the study of any literary or historical text.

FINDING OF FACT NO. 3

The instruction given by the University of Washington in general and in English 390 in particular is offered by the University as part of a secular program of education to advance the knowledge of its students and the learning of mankind; that in excess of 25,000 students (of whom in excess of 22,000 are in the undergraduate schools) are enrolled at the University of Washington.

FINDING OF FACT NO. 4

David C. Fowler, Nelson Bentley, and William F. Irmscher are duly and regularly appointed members of the faculty of the University of Washington and its English Department. Professor Fowler was appointed in 1952 and has served continuously since that time. Professor

Bentley was appointed in 1952 and has served continuously since that time. Professor Irmscher was appointed in 1960 and has served regularly since that time.

Said professors have taught English 390 as a regular part of their academic duties, Professor Fowler having taught it most recently during the Spring 1966 Academic Quarter; Professor Irmscher having taught it most recently during the Winter Academic Quarter, 1966. Defendant proposes to have Professor Bentley teach the course during Summer Quarter, 1966; defendant proposes to have Professor Fowler teach the course during Autumn Quarter, 1966.

All of said professors are competent scholars and qualified to teach *The Bible as Literature* in a objective way, using the approaches appropriate to their respective fields of specialization.

FINDING OF FACT NO. 5

Among the English translations of the Bible used in conjunction with said course are the Revised Standard Version, the King James Version, and the Oxford Annotated Edition of the Revised Standard Version. The Outlines for the Study of the Bible as Literature (Ex.1) serves as the syllabus for the course English 390 when Professor Fowler teaches it.

Text used in the course is selected by each professor teaching the course in accordance with his judgment of its suitability for teaching *The Bible as Literature.*

FINDING OF FACT NO. 6

English 390, as taught at the University of Washington, affords students the opportunity for a study about religious

ideas, religious behavior, and religious institutions at the hands of competent scholars; it is a study of the Bible for its literary and historic qualities presented objectively as part of a secular program of education. It does not promote a particular theology for purposes of religious indoctrination, nor is it slanted in a religious direction, nor does it induce any particular religious belief, nor does it advance any particular religious interests or theology.

FINDING OF FACT NO. 7

Courses such as English 390 are a common part of the curriculum of state universities throughout the United States.

A knowledge of the Bible is necessary for an understanding of English and American literature because of the frequent allusions to the Bible and its concepts in such literature.

The area of human thought and action represented by the Bible as literature is so important and central to human experience that to prohibit its inclusion in the University of Washington's course of study would seriously damage its curriculum.

FINDING OF FACT NO. 8

There is no evidence that English 390, as taught at the University of Washington, is intended to affect the religious beliefs of students taking the course or indoctrinate them in any particular religious belief, or that it has had that effect.

The Outlines for the Study of the Bible as Literature (Ex. 1), together with the bibliography included therewith (Ex. 3), prepared by Professor David C. Fowler, for English 390, is not slanted in any particular religious

direction, but does present an objective point of view based on a broad spectrum of Biblical scholarship.

CONCLUSIONS OF LAW NO. 1

This court has jurisdiction over the parties hereto and of the subject matter of this action.

CONCLUSIONS OF LAW NO. 2

Neither the First Amendment of the Constitution of the United States nor those provisions of the Constitution of the State of Washington found in Article I, section II (Amend, 34, and Article IX, section 4, prohibit the defendant from offering, as a part of its curriculum, a course wich studies the Bible for its literary and historic qualities when presented objectively as part of a secular program of education.

CONCLUSION OF LAW NO. 3

The teaching of English 390 at the University of Washington does not require or result in the expenditure of public funds or the use of public property for religious worship, exercise, or instruction.

CONCLUSION OF LAW NO. 4

The teaching of English 390 at the University of Washington does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment of the Constitution of the United States as it applies to the states through the Fourteenth Amendment.

CONCLUSION OF LAW NO. 5

The plaintiffs' complaint should be dismissed with prejudice, and the defendant should recover its costs herein incurred.

Dated this 14th day of June, 1966.

/s/W. R. COLE
Judge

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

THOMAS W. MILLER; and HAROLD WEBB, *Plaintiffs,* v. BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON, *Defendants.*	No. 657671 JUDGMENT

This matter having come on for trial before the undersigned Judge of the above-entitled court from June 6, 1966, through June 14, 1966, the plaintiffs, THOMAS W. MILLER and HAROLD WEBB, having been present in person and represented by their counsel Douglas J. Smith of the firm Cartano, Botzer and Chapman; and the defendant, Board of Regents of the University of Washington, having been represented by its attorney, the Attorney General of the State of Washington, and James B. Wilson, Assistant Attorney General; and Michael H. Rosen, Staff Counsel of the American Civil Liberties Union of the State of Washington, having submitted Amicus Curiae Brief on behalf of the American Civil Liberties Union of the State of Washington; and Carl P. Jensen of Lenihan Ivers, having submitted Amicus Curiae Brief of The Council of Churches of Greater Seatle, Inc., The Right Rev. Ivol Ira Curtis, D.D., Bishop of the Diocese of Olympia; Episcopal Church in Western Washington; The Catholic Archdiocese of Seattle; B'Nai B'Rith Hillel Foundation at the University of Washington; The Washington, Northern Idaho Council of Churches; The Protestant Denominational Executives Conference and The Religious Directors Association at

the University of Washington; and the court having heard all the evidence presented by these parties thereto, and the arguments of counsel, and having entered its Findings of Fact and Conclusions of Law; now therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the complaint herein be and it is hereby dismissed with prejudice, and that the defendant recover its taxable costs herein incurred.

DONE IN OPEN COURT this 14th day of June, 1966.

/s/ W. R. COLE
Judge

Presented by:
/s/ JAMES B. WILSON
James B. Wilson,
Assistant Attorney General,
Attorney for the Defendant.

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IN THE
Supreme Court of the United States

October Term 1968

No. [redacted] 135

CALVARY BIBLE PRESBYTERIAN CHURCH OF SEATTLE,
a non-profit corporation;

TACOMA BIBLE PRESBYTERIAN CHURCH,
a non-profit corporation;

REV. THOMAS W. MILLER and REV. HAROLD WEBB,
Petitioners,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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October Term 1967
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COUNTER STATEMENT OF THE CASE

Because of the argumentative nature of the petitioners' statement of the case, respondent feels compelled to make this statement of the essential facts:

As was affirmed by the Supreme Court of the State of Washington, the record at the trial of this cause amply supports the trial court's findings that English 390: The Bible as Literature has been a regularly offered course of the University of Washington since 1919 and concerns itself with the literary features of the Bible and, as a necessary part thereof, the history of ancient Israel, the authorship and treatment of the various books of the Bible, and interpretation of the Bible from a literary

and a historical point of view, employing the same techniques of scholarship used in the study of any other literary or historical text. English 390 is offered by the University of Washington as a part of a secular program of education to advance knowledge of its students and the learning of mankind, and the faculty members who teach English 390 are regularly appointed members of the English Department of the University of Washington, and they teach English 390 as a regular part of their academic duties. Each professor selects his own English translation of the Bible for use in the course.

English 390 affords students the opportunity for a study *about* religious ideas, religious behavior, and religious institutions at the hands of competent scholars; it is a study of the Bible for its literary and historical qualities, presented objectively as a part of a secular program of education and does not promote a particular theology for purposes of religious indoctrination, nor is it slanted in a religious direction, nor does it induce any particular religious belief, nor does it advance any particular religious interests or theology. Courses such as English 390 are a common part of the curriculum of state universities throughout the United States, and a knowledge of the Bible is necessary for an understanding of English and American literature because of its frequent allusions to the Bible and its concepts in such literature. English 390, in short, is a study of the Bible presented objectively as part of a secular program of education. (R. Tr. 11)

REASONS FOR NOT GRANTING THIS WRIT

1. Petitioners' contention that teaching English 390 at the University of Washington is a violation of the Establishment Clause of the First Amendment, United States Constitution, does

not raise a substantial federal question for review. The issue was raised by petitioners at the trial court and at the State Supreme Court, and those courts found that the course not only did not violate the First Amendment proscription, but that it did not violate the more explicit provisions of Washington's Constitution which forbid the use of public money or property for any religious worship, exercise or instruction. (Wash. Const. Art. 1, Sec. 11) This Court may not have been afforded an opportunity in any previous decision to rule on the precise issues raised by the instant petition, but respondent submits that the conclusions of the trial judge and the Washington Supreme Court are in accordance with the dicta of this Court in related opinions.

Thus, in *School District of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844, where this Court ruled that the daily recitation of verses of the Lord's Prayer as a part of the opening ceremonies in the public schools of Abington Township was a violation of the Establishment Clause of the First Amendment, Justice Clark, speaking for the Court, noted that the state was:

> "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison."

This Court stated there was little doubt as to the religious character of the exercises and that they violated the Establishment Clause of the First Amendment. Justice Clark observed, however, that

> "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

Justice Brennan in his concurring opinion in *Schempp, supra,* distinguished that case from one which might involve the "non-devotional use of the Bible in the public schools." He said:

> "The holding of the court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion." (374 U.S. p. 300)

Thus, while its expressions may have been dicta, this Court has spoken on the issue raised by the petitioners, and its expressions wholly support the decision of the Washington State Supreme Court.

2. Petitioners' contention (Pet. Br. p. 11) that "The decision of the court below authorizes the teaching of secular religion in the public schools" illustrates the frivolous nature of their claim. There may be many things taught at a University which offend petitioners' religious beliefs but, as Justice Frankfurter noted in his dissent in *Board of Education vs. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 82 L.Ed. 1628 [1943] at page 654,

> "The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men."

And so, it might be added, much that concerns the scholar affects the spiritual interests of men. But to disqualify such interests from scholarly study in a state university on the principles asserted by petitioners would subordinate the state and its university to anything deemed within the sovereignty of religious conscience by some sectarian agent.

3. Since the granting or denial of the Writ rests with the sound discretion of the Court, the words of Justice, Robert Jackson, concurring in *State ex rel. McCollum vs. Board of Education,* 333 U.S. 203, at page 235, 68 S.Ct. 461, 92 L.Ed. 649 [1948] seem appropriate. Though he was concerned about petitioners' standing to sue, the following seems pertinent to the question now before this Court:

> "Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teachings everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.
>
> "While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction."

Respondent respectfully submits that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General, State of Washington

JAMES B. WILSON,
Assistant Attorney General
Counsel for Respondent